

U.S. Department of Labor

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DATE ISSUED: November 30, 2000

CASE NO.: 2000-LHC-1736

OWCP NO.: 7-130178

IN THE MATTER OF

**SKURLEY J. NICHOLAS
Claimant**

v.

**MATTHEW MARINE, INC.
Employer**

**LOUISIANA WORKERS' COMPENSATION CORPORATION
Carrier**

APPEARANCES:

**John D. Gibbons, Esq.
For Claimant**

**Ted Williams, Esq.
For Employer/Carrier**

BEFORE: C. RICHARD AVERY

Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), brought by Skurley Nicholas (Claimant) against Matthew Marine, Inc (Employer) and Louisiana Workers' Compensation Corporation (Carrier). The formal hearing was conducted at Metairie, Louisiana on September 11, 2000. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.¹ The following exhibits were received into evidence Joint Exhibit 1, Claimant's Exhibits 1-9, 12-13 and Employer's Exhibits 1-8, 10-11.² This decision is based on the entire record.³

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. Claimant alleges a hearing loss on November 21, 1997, but Employer/Carrier dispute the occurrence of such accident;
2. It is disputed that an employer-employee relationship existed at the time of the alleged injury;
3. It is disputed that the alleged injury arose in the course and within the scope of employment;

¹The parties were granted time post hearing to file briefs. This time was extended up to and through November 10, 2000.

²Claimant withdrew exhibits 10 and 11. Employer withdrew exhibit 9 and submitted exhibit 4 post-hearing.

³ The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __, lines __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

4. Notification of the alleged injury pursuant to Section 12 of the Act was given to Employer on July 6, 1999, and the Secretary of Labor on July 15, 1999;
5. Employer's Notice of Controversion was filed July 20, 1999;
6. No informal conference was held;
7. It is disputed that disability resulted from the alleged injury;
8. No medical benefits under section 7 of the Act or disability benefits have been paid; and
9. Claimant's average weekly wage was \$800.03, and the compensation rate was \$533.36;

Unresolved Issues

The unresolved issues in this case are:

1. Whether Claimant suffered a hearing loss while employed by Matthew Marine from November 13, 1997 to November 21, 1997;
2. If Claimant suffered such injury, then the nature and extend of Claimant's alleged hearing loss;
- 3, Claimant's entitlement to permanent partial disability benefits (scheduled) pursuant to section 8 (c) (13) of the Act; and
4. Attorney's fees and costs.

Statement of the Evidence

Claimant was a 59 year old retired boiler maker at the time of trial. His alleged injury occurred on November 21, 1997, while employed by Matthew Marine. His last day of work, while employed by someone other than Matthew Marine, was June 2, 1999. Claimant has been certified as a heliarc welder for the past 30 years, and is a member of the union. Over Claimant's career, he worked

for various industrial plants and ship repair facilities.

Claimant was last employed by a ship repair facility, Matthew Marine, in November of 1997. He obtained this job through the union. Claimant worked on the Nicholls Street Wharf, next to the Mississippi River. He performed general ship repair which included welding, burning, fitting, arc gouging, and grinding. Claimant's co-workers included Stanley Dupuy, Frank Davis and Scott Hambreist.

While working for Employer, Claimant's job was to replace the damaged steel plates on the side of the ship GOLDEN CHASE.⁴ Employer's records reflected that this job took 9 days to complete. Claimant testified that he thought the job took closer to three weeks. When Claimant arrived on the scene, the hold of the ship was open and the plates were ready to be fit. Claimant started midway into the job and finished his task before the entire job was completed. Claimant thought there were at least 10 men per shift on this job who worked inside and outside of the hold and on the deck.

Claimant only worked inside the hold of the ship. He specifically worked inside of a cargo hold, about 50 to 75 feet long, and at least 35 feet wide. Apparently, the cargo hold was open air or not enclosed.⁵ Claimant stated that new people were brought onto the ship to do work other than welding during the time Claimant and his co-workers were welding.⁶ The engines were never running while Claimant was onboard.

Claimant worked as a welder during the night shift, 7 days a week, 12 hours per day. To perform his job he used a welding machine, cutting torch, electric

⁴Employer's Exhibit 11 are the pictures of the actual job site. Counsel mis-spoke when he asked Claimant to look at Employer's Exhibit 7.

⁵Employer's Exhibit 11, page 2, the bottom left-hand corner picture was presented to Claimant as being representative of his work area. Claimant testified that he was unsure if that was the area.

⁶During Claimant's deposition, he stated that the only work being done on the GOLDEN CHASE was the work that he and the other welders were performing.

grinder, arc gouger, chipping hammers and mauls, and dogs to pull in the plates.⁷ Claimant used his welding machine about 10 of the 12 hours per day during his shift. He used the arc gouger between one and three times a day, between five minutes and a couple of hours. Claimant's use of the cutting torch varied depending on the work he performed.⁸ The maul hammer was a constant noise hammering on iron all day.

On an average day inside of the hold, Claimant performed welding and fitting, and used an arc gouger. Claimant and his co-worker, Stan Dupuy, worked on the same scaffold, within a hand's distance away from each other. Claimant thought there were three or four others working inside the same hold, further down, in addition to the welders working on the outside of the ship. The number of additional workers varied depending on what activity was performed during the day. Any noise these others made would amplify throughout the hold.

According to Claimant, while working for Employer, the noise level was "real high" about 80% to 85% of the time. Claimant said the equipment he used that made the most noise was the arc gouger, chipping hammer and maul hammer. His co-workers working inside the hold with him and outside on the ship were also welders, and therefore used the same equipment at the same time as Claimant during the day. Even if Claimant was only welding, the noise from the other workers inside and outside the hold was loud.⁹

Claimant testified that no hearing protection was provided by Employer. According to Claimant, the noise on the inside of the ship was amplified. Claimant testified that he previously worked on ship repair jobs for other ship repair companies. The noise from past jobs was similar to the noise Claimant experienced while working for Employer. He used the same equipment doing

⁷During Claimant's deposition he forgot to mention that he used a grinder and chipping hammer regularly while working for Employer.

⁸During Claimant's deposition he stated that he used it one or two hours a day. But, on cross examination, he stated that time frame was not a fair estimate of its use.

⁹During Claimant's deposition, he stated that if he was welding or using a cutting torch, he did not need hearing protection. Claimant during trial stated that once he put the earplugs in he wore them the entire day.

Employer's work as he did for the other companies.

Claimant recognized Mr. Chalastaras sitting in the courtroom.¹⁰ Claimant stated that he had seen Mr. Chalastaras at the work site, bringing their pay checks on Fridays. According to Claimant, he never saw him inside of the hold.

About ten to twelve years ago, Claimant began wearing earplugs.¹¹ For the first part of Claimant's career as a welder he did not use any type of ear protection, because it was not the industry standard. Claimant admitted that he has had a loss of hearing over the last 20 years. Claimant stated that all of his employers, except Matthew Marine, provided hearing protection.

Claimant, after working for Employer, continued to work for another year and one half, almost two years, before he retired. He continued working through the union hall, job to job. Claimant did not work for any other maritime employer after Matthew Marine.

Claimant had audiograms performed prior and post employment with Matthew Marine. Claimant was asked about Employer's Exhibit 3, which showed that Claimant had an audiogram four days after he left Employer, on November 25, 1997, by an audiologist, Ms. Ramallo. Claimant had this audiogram because he noticed a ringing in his ears after working for Employer for 9 days. Claimant testified that he had minor ringing in his ears before working for Matthew Marine, but after leaving the employment of Matthew Marine, the ringing worsened.

Claimant told Dr. Brousse in December 1998, that he had a ringing in his ears for many years that sounded like crickets. Claimant told Dr. Gonsoulin that he had ringing in his ears since 1994 that sounded like swamp noises. Claimant testified that the union arranged for some of his audiograms. He was unable to remember if he had an audiogram in 1997, right before he went to work for Employer.

Claimant was unable to remember filing a hearing loss claim against his past

¹⁰Mr. Chalastraras is the president of Matthew Marine.

¹¹The earplugs were the "gooey or elastic earplugs" that are stuck into an ear.

employer Boland Marine.¹² He said he remembered a claim being filed against his other previous employer, Dixie Machine Welding, in December 1997.

Dimitrius Jimmy Chalastaras testified during trial. He has been the president of Matthew Marine since 1995, when a branch opened in New Orleans.¹³ Mr. Chalastaras was the president when Claimant worked there in 1997. His business was one of ship repair. As regards Mr. Chalastaras's qualifications for shipbuilding and ship repair, he was a naval architectural marine engineer.

Mr. Chalastaras remembered the GOLDEN CHASE job, which was to replace the shelf plate on the side of the ship. This was the biggest steel job that the New Orleans branch had performed. He had about 20 to 30 employees total, hired through the union. The repairs took place at the Governor Nicholls Wharf, which is not a shipyard, and lasted for about 18 days. Mr. Chalastaras testified that he was on the job site from start to finish, handing out the paychecks and instructing the workers.¹⁴ Mr. Chalastaras looked at the Matthew Marine pay records and determined that Claimant worked for Employer from November 13, 1997 until November 21, 1997, nine days total.¹⁵ According to Mr. Chalastaras, Claimant worked the day shift, from 8am until 8pm. Since Claimant worked during the day, Mr. Chalastaras was certain he was present at the site.

Mr. Chalastaras explained the procedure of the entire job. The first three days were used for the cropping of the plates and removing the frames. This was all finished by the time Claimant began working at the site. After the cropping, the pre-fabricated frames were fit into place and welded. When Claimant came onto the site, the fabrication should have been almost completed. The next step would have been the fitting of the plates. The tools used included a torch, chain hoist and wedge. Not much wedging occurred, since mostly new plates were used and the

¹²Claimant's Exhibit 1 shows that a hearing loss claim was filed against Boland Marine in June 1993.

¹³Matthew Marine began in Houston, Texas with Mr. Chalastaras's father, in the 1960s.

¹⁴He was physically at the site daily, but not continuously, because he left and returned with needed supplies.

¹⁵See Employer's Exhibit 10

old plates were not being salvaged.

Mr. Chalastaras testified that Claimant probably came onto the site towards the end of the fitting, since that was when welders were needed. Mr. Chalastaras explained that tacking was part of the welder's job. Tacking secured the plate onto the hull, or the frame onto the plate, and a welding machine was used for this procedure. If Claimant was there during the tacking phase, he would have performed the tacking, since it was a welding procedure. Mr. Chalastaras explained that during the wedging process, a maul was used. The noise from this use was a constant. However, once the plate was tacked and secured into place, the maul was not used again during the welding process.

During the welding phase, a chipping hammer would have been used to take the flux off of the weld. Mr. Chalastaras could not remember if the gouging had been completed by the time Claimant began work. According to Mr. Chalastaras, there was only one arc gouger on the facilities. He was sure that Claimant would have used the arc gouger when finishing the welds. No air, or pneumatic, tools were used.

According to Mr. Chalastaras, there were eight to twelve welders on the day shift. The night shift required fewer welders because welding, but not fitting, was performed. There were welders working outside and inside the hold and on the deck. Mr. Chalastaras had performed other repair jobs on other ships. The noise level, in comparison to these other jobs, was the same. He stated that if they had tried to reform the old plates, instead of using new plates, the noise would have been worse.

According to Mr. Chalastaras, neither Frank Davis nor Scott Hambreist complained about lack of hearing protection. Mr. Chalastaras said hearing protection was available on this job, though he himself did not use any. A box of "squishy" earplugs was located in a box with the welding rods and cutting tips. He stated that most of the welders brought their own equipment, including earplugs. However, if a welder did not have earplugs and asked Mr. Chalastaras for them, Mr. Chalastaras would provide them with the proper hearing protection.

As regards Employer's Exhibit 11, the pictures of the GOLDEN CHASE, Mr. Chalastaras stated that the pictures looked as though the job was about half

way complete. He believed this to be so because the plates were already fitted. Mr. Chalastaras would not say that the job was close to being completed because there was a lot of welding that had to be performed after the plates were fitted. He was unsure as to where the other 12 to 13 workers were, since they were not present in the picture. According to Mr. Chalastaras, the lower left-hand corner picture on page 2 looked to be a picture of where Claimant worked, if that picture was the inside of the hold, and he testified that it appeared to be just that.

Mr. Chalastaras had performed welding himself, though he was not a certified welder. He has used a grinder to smooth welds. He testified that a grinder is “probably loud, depends what every person calls loud.” (Tr. 76, line 1) He stated that an arc gouger was not hearing- loss loud. In his opinion, an arc gouger is just as loud as a grinder but it “depends on how much grinding is involved.” (Tr. 76, lines 10) Only two grinders were used on this job, one small and one big.

Mr. Chalastaras estimated that if he spent 4 hours outside of the hold, then 4 hours were spent inside of it. He qualified his statement by saying that he spent more time inside the hold during the beginning of the job to give instructions. While inside the hold, Mr. Chalastaras thought it was loud when banging was involved. However, he explained that the hold was not an enclosed area. It had about “100-feet by 100-feet opening on top. The noise goes off the top.” (Tr. 77, line 4) Mr. Chalastaras admitted that it would be a “little” louder inside the hold than outside of it.

Laurance Robert Durio testified during the trial.¹⁶ He is a self-employed industrial hygiene consultant doing business as Durio Consulting Services. He does noise control and environmental work. He is certified by the American Board of Industrial Hygiene in the comprehensive practice of industrial hygiene and is certified in industrial audiology by the Council for the Accreditation of Occupational Hearing Conservationists. He was accepted as an expert in the field of industrial hygiene.

In the field, Mr. Durio does “simple noise exposure or source level assessments on up through setting up full hearing conservation programs and developing engineering controls for noise.” (Tr. 84, line 8) He also performs,

¹⁶Employer’s Exhibit 5 is his report.

reviews and evaluates audiometric tests and programs, though he prefers to bring in a practicing audiologist. He is qualified to read such tests, but cannot provide a true medical diagnosis, prescription or treatment. Mr. Durio is qualified to take decibel readings on equipment and other tools.

Mr. Durio is familiar with the Occupational Safety and Health Administration (OSHA) standards regarding hearing protection and actually worked for OSHA as an industrial hygiene supervisor. He is familiar with the ISO standards, which, as he explained, are a compilation of standard values or references to determine likely degrees of hearing loss at different exposure levels, and incidences of hearing loss in the general population.

Mr. Durio went to Matthew Marine and performed decibel measurements on August 31, 2000. Prior to taking the measurements, Mr. Durio reviewed Claimant's deposition, Dr. Gonsoulin's report, and Ms. Ramallo's report. After his initial review of those documents, he "gleaned" that Claimant had a relatively constant mild to moderate hearing loss and that Claimant had been exposed to a maximum of three weeks outside while working for Employer. With regards to Claimant's deposition, Mr. Durio gathered information about the tasks performed, tools utilized, and the timing of when Claimant began work.

Tests were conducted through a simulation of Claimant's work environment. These tests were performed in an open shop area instead of inside the hold of a ship, because no ship was available during the testing. Mr. Durio discussed with Mr. Chalastaras the types of tasks Claimant performed and how they were performed, so that these tasks would be incorporated into the simulation. For the purpose of the simulation, Mr. Durio actually conducted gouging, welding, cutting, grinding, wedging and chipping. From his interview with Mr. Chalastaras, it appeared that when Claimant came onto the job, most of the wedging was finished, as was the gouging, initial fabrication, cropping, fitting and tacking.

To conduct the tests, Mr. Durio placed multiple measuring instruments on Mr. Chalastaras, who performed the tasks in question. No one else performed tasks to simulate other welders or fitters. His timing of the test was 25 % gouging, 50 % welding and 25 % grinding. Mr. Durio believed from experience that gouging was the loudest task. Wedging was loud on an impact basis, but only for 20 to 50 milliseconds, about a 20th of a second. Wedging included the use of a maul. Mr.

Durio used a 10 pound maul, instead of the 3 to 4 pound maul Claimant used while working. In his experience, a 10 pound maul made more noise than a 4 pound maul. Mr. Durio and Mr. Chalastaras did not wear hearing protection.

The tests results ranged “from the high 70s to the low 80 decibels on the A scale.”¹⁷ (Tr. 94, line 3) The actual taking of the decibel levels only lasted for one hour, but Mr. Durio translated that reading to a 12- hour workday. When asked by counsel whether Claimant was exposed to a range between 80.9 and 83 decibels over a 12-hour period, Mr. Durio stated that the decibel level Claimant was exposed to would be closer to 83 decibels, since he had others working around him. His conclusion was based on the testing and his experience with similar work environments. The actual welding noise level average was between 78 and 79 decibels. The gouging averaged between 98 to 102 decibels and the grinding averaged between 93 and 94 decibels. There were instances of 141 decibels being emitted from the impulse noise from wedging. On cross examination, Mr. Durio stated that if Claimant was gouging for a couple of hours, he would be exposed to 100-plus reading for those few hours.

When the noise from gouging, welding and grinding was considered, Mr. Durio’s results were a “measured 83 [decibels] using the hearing conservation criteria, and it was right at 80 [decibels] with the damage risk criteria.” (Tr. 96, line 9) . When the noise from the welding and grinding, but not the gouging, was considered, his readings were 81 decibels using the hearing conservation criteria, and 78 decibels using the damage risk measurement. The “worse case sample,” therefore, was the 80 to 83 decibels.

Mr. Durio explained the OSHA standard requires hearing protection when the decibel level reaches 87.2 over a 12- hour average. The hearing preservation requirements of OSHA are triggered when the decibel level reaches 85. So, in Claimant’s case, Mr. Durio stated that he did not “hit” those decibel levels. Mr. Durio explained that according to OSHA, there is no hearing loss until about 90 decibels over a 8-hour average working lifetime, at which point there is a 5 or 6 percent incidence of loss beyond aging. Mr. Durio used the working lifetime of about 40 years. If he “plugged” his results of the simulation into the ISO

¹⁷“The A scale was used for hearing conservation purposes because it corresponds to the frequency response of the human ear.” (Tr. 94, line 4)

standards, Mr. Durio stated it was below the lowest level that ISO calculates as damaging.

Mr. Durio was asked if Claimant was exposed to his entire work-life as a welder, would he then suffer from noise-induced hearing loss. Mr. Durio responded that at the levels Claimant was exposed to, he would have a zero percent noise-induced hearing loss, but he probably would have an age-related hearing loss.

Mr. Durio reviewed Claimant's 1992 audiogram, Claimant's Exhibit 7. He took the integrity of the test at face value without knowing who performed the test and whether that person was certified. There was an indication on the test that the machine used was calibrated. Mr. Durio testified that he was qualified to interpret the audiogram, but not to render a medical diagnosis. After reviewing the test, he wrote his September 5, 2000 report, Employer's Exhibit 5. Mr. Durio's report stated that Claimant had a hearing impairment, with an impairment rating of "11.3 better ear, and 13.1 binaural."

Mr. Durio's report stated that Claimant had a noise-induced hearing loss. His explanation was that Claimant's lifetime average noise exposure ranged in the mid to upper 90 decibels, while Claimant's exposure while working for Matthew Marine averaged in the low 80s. Mr. Durio testified that a man cannot suffer a hearing loss from being exposed to low 80 decibels, for eight-hours at a time, over an indefinite period. According to the studies and literature he has read, a human being exposed to a lifetime of low 80 decibels would not experience a hearing loss. Mr. Durio's opinion was that Claimant, exposed to a decibel level in the low 80s over a nine-day period, would not suffer any degree of hearing loss.

As regards an age-induced hearing loss, Mr. Durio's analysis of Claimant was "16.9 percent binaural, both ears and 15 percent right ear or better ear." (Tr. 135, line 22) He explained that by the time Dr. Gonsoulin examined Claimant, Claimant's hearing should have deteriorated due to the aging process.

Mr. Durio reviewed Dr. Gonsoulin's 1999 report. Dr. Gonsoulin indicated slightly less impairment than Mr. Durio calculated, but overall, Mr. Durio explained that the two impairment ratings were very similar. Dr. Gonsoulin's binaural impairment rating was 12.8, as opposed to Mr. Durio's 13.1.

Mr. Durio reviewed Ms. Ramallo's audiogram, Claimant's Exhibit 8. This audiogram was taken 4 days after Claimant left Matthew Marine. Mr. Durio interpreted this audiogram as invalid because the range of the readings varied from 20 to 25 decibels. This "extreme inconsistency would be indicative of less than full cooperation" by Claimant. (Tr. 109, line 1)

Mr. Durio reviewed the noise surveys done at Ingalls Shipyard and Alabama Dry Dock.¹⁸ He testified that he did not find the Ingalls Shipyard survey applicable to Claimant's case. Ingalls Shipyard is a different operation than Matthew Marine, because it dealt with new construction, more people and more activity. He was unfamiliar with Alabama Dry Dock.

Mr. Durio testified that scientific studies have showed an individual's hearing loss is most extreme over the first five years of exposure. During that time, a person will get between 85% and 90% of their loss. Over the next ten years, the remaining 10% to 15% of the loss is achieved. After about 15 years, the loss becomes stabilized. Once the individual gets into their 20th, 25th or 30th year of exposure, there is no measurable hearing loss if there is a stable noise environment.

After Mr. Durio reviewed Claimant's deposition, the interview with Mr. Chalastaras, and the testimony he heard during trial, it was his opinion that Claimant was not exposed to an injurious noise stimuli while employed by Matthew Marine. It was also Mr. Durio's opinion that other people working around Claimant would not have contributed more than a decibel or two to the noise level. He testified that even taking his highest readings and doubling them, Claimant would still not have been exposed to injurious levels. One reason for such a conclusion was that the percentage of binaural impairment was greater in 1992 than it was in the audiograms taken by Drs. Gonsoulin and Brousse. By 1999, Claimant had not suffered any more damage than in 1992.

Claimant's Exhibit 12 and 13 are the noise surveys performed at Ingalls Shipping and Alabama Dry Dock, respectively. Ingalls Shipping is a shipyard. At Ingalls, noise surveys were taken in 1974, 1975, 1983 and 1984. The reports stated that pneumatic tools were used to perform work. Under OSHA law, the maximum

¹⁸See Claimant's Exhibits 12 and 13, respectively.

noise exposure per 8-hour work day is 90 decibels. It was recommended that audiograms be performed on all employees. Maps of the operations showed the areas of high-noise production, high-noise non-production, and high-noise fixed equipment. Also included was employee information which listed the length of employment, location working in the shipyard, and the dosimeter reading for an 8-hour shift. These readings ranged from 90 decibels to 110 decibels.

The survey of the Alabama Dry Dock and Shipbuilding Company was taken in 1970. Several of the locations measured produced noise exceeding 90 decibels. Recommendations were made that hearing protection should be worn when the decibel level reached 90.

Employer's Exhibit 10 is the Matthew Marine wage records of Claimant. Claimant's Exhibit 6 is Claimant's 1997 income tax return. Also included are Claimant's W-2 forms for various employers. Employer's Exhibit 6 and 7 are Claimant's two claims against other former employers, Boland Marine and Dixie Machine. Employer's Exhibit 8 is the records of International Brotherhood of Boilermakers Local #37.

Medical Evidence

Claimant's Exhibit 7 is an audiogram taken of Claimant on December 17, 1992. No evidence was offered to interpret this test.

Employer's Exhibit 4 is the records and reports of the Occupational Health Center. Claimant was examined on July 11, 1997 by Dr. Espenan.¹⁹ Dr. Espenan's report stated that Claimant had problems including a congenital malformation of his shoulder joint, a left eye vision problem, and asbestosis. In addition, Claimant had "decreased hearing in the high frequency range, that is 50 db. and 2K on up to 8K. This cannot be corrected with hearing aids and it indicates that you have been exposed and received damage from working in noisy areas." (pg. 2) Page 5 was the "audiometric patient history evaluation." Claimant rated his hearing as "average" and indicated that he wore ear plugs for hearing protection. On the "medical and exposure history," Claimant indicated that he was exposed to loud noise while working at a job.

¹⁹No evidence was offered as to his credentials.

Employer's Exhibit 3 and Claimant's Exhibit 8 is the report of Beatriz Ramallo, a clinical audiologist.²⁰ Ms. Ramallo performed an audiological evaluation of Claimant on November 25, 1997, at the Joachim Hearing and Speech Clinic. She stated that Claimant's medical history indicated 37 years of work-related noise exposure, 2 years recreational noise exposure from hunting, and binaural tinnitus. "The pure tone audiometric information obtained from Claimant's behavioral evaluation was inconsistent and unreliable. These results are inconclusive." (pg. 1) She recommended another audiological evaluation for a possible diagnosis.

Employer's Exhibit 6 contained a report by Dr. Robert Brousse.²¹ He examined Claimant on December 28, 1998, as a referral for an audiological evaluation to assess Claimant's current hearing. Claimant explained to Dr. Brousse that he observed a noise in his ears that resembled crickets, and that he has had a hearing loss over time. Claimant had a work history with noise exposure. He denied hunting experience, but admitted to a family history of hearing loss. Claimant admitted to only recently using hearing protection. He also told Dr. Brousse that his hearing was worse today with background noise and crowded surroundings. Claimant underwent a physical examination and an audiogram. Following a finding of 14.4 binaural hearing impairment, Dr. Brousse opined:

"Claimant has bilateral sensorineural hearing loss in the range from mild to moderate. This hearing loss is consistent with Claimant's age. However, Claimant's history of extensive noise exposure that Claimant described today is most likely contributing to his current level of hearing. The contribution of each of these factors to Claimant's hearing loss is indeterminable. I feel that Claimant is a candidate for hearing amplification for this problem, which most certainly is a permanent situation, when desired. No surgical treatment is indicated for Claimant's hearing loss, and noise protection for further noise exposure had been stressed." (pg. 7)

Employer's Exhibit 2 is the deposition of Dr. Thomas Gonsoulin, taken September 7, 2000. He is a board certified otolaryngologist. He generally treats patients with ear, nose and throat problems. He discussed his educational

²⁰No evidence was offered as to her credentials.

²¹No evidence was offered as to his credentials.

background. Twenty percent of his practice involves hearing loss patients. Dr. Gonsoulin was asked to assume during the deposition, that Claimant was employed at Matthew Marine for 9 days with the job of repairing a ship.

Dr. Gonsoulin examined Claimant on September 27, 1999. Claimant was referred to his office by Claimant's attorney. Claimant's attorney asked Dr. Gonsoulin to examine Claimant, test his hearing, and opine the etiology of his hearing loss. Prior to the examination, Dr. Gonsoulin was provided with Claimant's social security printout and a copy of a the November 25, 1997 audiogram performed by Beatriz Ramallo.

During his examination, Claimant told Dr. Gonsoulin that he had a history of a gradual hearing loss over the last twenty years that was worsening with time. He described a constant ringing in both ears, that sounded like swamp noises, for the past 5 years. Claimant explained that he performed construction work from 1960 until July of 1999, and only wore hearing protection regularly for the past 8 years. Claimant had fired shotguns in the past and used power tools at home. However, he stated he always wore hearing protection. He denied a family history of hearing problems, though his brother, another boilermaker, wears a hearing aid. Claimant did not reference his employment with Matthew Marine as the cause of his hearing loss during his visit with Dr. Gonsoulin.

Dr. Gonsoulin performed an audiometric examination to define Claimant's hearing level. Another test, a tympanogram, was performed to measure Claimant's middle ear pressure. Dr. Gonsoulin described how the test was performed, as well as the components of the test. After reviewing Claimant's audiogram of September 27, 1999, he opined Claimant had a "noise-exposure sensorineural hearing loss in both ears, worse in the left than the right." (pg. 16) A sensorineural hearing loss is a hearing loss that describes an abnormality in the inner ear or hearing nerve, as opposed to the ear canal, eardrum, or middle ear space. As a result of this loss, Claimant may not be able to hear his watch tick, or even the telephone ring.

Dr. Gonsoulin explained that Claimant suffered from an asymmetrical hearing loss. In other words, as regards Claimant's hearing test, the level of his right ear at 2000 cycles per second was different from his left ear. Dr. Gonsoulin testified that such a difference is not consistent with occupational noise exposure. He explained that for the loss to be asymmetrical, Claimant would have been exposed to a louder

sound on his left side, than his right side. Usually in a work environment people move around, thereby injuring both ears simultaneously. Dr. Gonsoulin said it was possible, but not very probable, to have a work environment where the loud noise was more on the left than on the right, whereby, the head protected the right ear. Dr. Gonsoulin agreed that it was possible for Claimant to have a degree of hearing loss related to occupational exposure, and in the left ear have another noise exposure superimposed upon it. As regards the causation for the asymmetrical hearing loss, Dr. Gonsoulin believed it might have been a result of Claimant shooting a .410 shotgun as a youngster.

Dr. Gonsoulin was familiar with Dr. Brousse. He testified that Dr. Brousse is another ear, nose and throat doctor. Because Dr. Brousse had examined Claimant on December 28, 1998, a year earlier, Dr. Gonsoulin was asked questions about Dr. Brousse's report. Dr. Gonsoulin stated that Claimant describing the bilateral ringing in his ears as "cricket noises" for Dr. Brousse was consistent with his description of "swamp noises." Claimant was also consistent in admitting that he had noticed a progressive hearing loss over the years. Both doctors described the audiogram of Claimant as "showing a sloping mild to moderate sensorineural hearing loss." (pg. 22)

The results from the individual components of the tests differed when Claimant took the tests with Drs. Brousse and Gonsoulin. Dr. Gonsoulin explained that the tests are subjective in part. Some variance in scores from tests taken a week apart would be normal. Possible reasons for this variance could be a "blocked-up" ear, lack of attention, difference of audiologist's voice, or perhaps one sound booth was not as sound proof. Dr. Gonsoulin had given Claimant a binaural handicap rating of 12.8 percent, but Dr. Brousse had calculated the impairment at 14.4 percent. Dr. Gonsoulin explained that was not a significant difference.

Dr. Gonsoulin was asked to interpret the 1992 audiogram taken of Claimant. It was his opinion that Claimant's hearing was worse in 1999 than it was in 1992 based on the audiograms. Dr. Gonsoulin was unable to assign a percentage on how much worse Claimant's hearing seemed to be in 1999. He wondered if the 1992 audiogram was even comparable to the 1999 audiogram, because the way the 1992 audiogram was written led him to believe that perhaps the test was done in a van with a technician, as opposed to a sound proof booth with an audiologist. He

also noticed a 10 decibel difference at one thousand cycles per second. A normal and expected difference would be about 5 decibels, but 10 decibels was a real difference.

Dr. Gonsoulin explained that he did not include Beatriz Ramallo's 1997 audiogram in his report because she admitted in her report that the audiogram was inconclusive. He explained that results could be inconsistent if the patient was having a bad day, did not understand the instructions, had an upper respiratory infection, or tried to manipulate the test.

Dr. Gonsoulin was asked about Dr. Espenan's report. Dr. Espenan reported that Claimant had decreased hearing in a high frequency range. Dr. Gonsoulin explained that Dr. Espenan did not differentiate between the right and left ear. Dr. Espenan also did not specify the frequencies he tested. Even though Dr. Espenan stated he tested 2000 through 8000 cycles per second, Dr. Gonsoulin explained that not everyone checks 3000 cycles per second.

Dr. Gonsoulin discussed hearing loss caused by age. Typically, the hearing level decreases at the upper frequencies when a person ages. There are many reasons for this decrease including the aging process, loud-noise exposure, and circulation. Dr. Gonsoulin was unable to speculate if Claimant's degree of hearing loss was consistent with someone Claimant's age.

Dr. Gonsoulin testified that it was possible for Claimant to experience some hearing loss if exposed to a constant 83 decibels over a 12- hour period for nine days.²² However, such hearing loss could possibly be temporary, because the ear can recover from noise exposure. According to Dr. Gonsoulin, the only way to know if Claimant suffered a hearing loss was to perform a pre-work audiogram and a post-work audiogram.

Dr. Gonsoulin was asked to assume that Claimant, while employed by Matthew Marine, suffered a two percent hearing loss at most. Dr. Gonsoulin stated Claimant would probably not notice the difference in his hearing and Claimant did not tell him that he had noticed such a loss.

²²He explained that a hearing loss would not be expected until an individual was exposed to 80 decibels.

On cross examination, Dr. Gonsoulin testified that he would not be comfortable with an audiogram unless performed by a certified audiologist in the appropriate setting. He explained that loud noise exposure could cause tinnitus, or ringing in the ears. On the typical audiogram, loud-noise exposure manifests itself at 4000 cycles per second in an upward curve on both sides of that loss. Claimant's test had such "a notching."

The OSHA standards dictate that a person will experience hearing problems if exposed to 90 decibels, 8 hours a day. Dr. Gonsoulin thought that a person exposed to 90 decibels, 7 hours a day over 50 minute intervals, would also experience hearing problems. Dr. Gonsoulin thought Claimant would be a candidate for hearing aids if he so desired, though he was unsure how much the hearing aids would help Claimant.

Dr. Gonsoulin was aware that Claimant had continued to work during the two year period between when he was employed by Matthew Marine and when he was tested by Dr. Gonsoulin. Dr. Gonsoulin testified that it was possible that during that two year interval, Claimant's subsequent employment could have caused some of his hearing loss. He explained that generally a hearing loss occurs over the first five years of exposure to loud noise. If Dr. Gonsoulin assumed that Claimant's work history of 20 years was correct, then Claimant experienced the most hearing loss during his first five years of employment. During the following 15 years, Claimant's progression would not be as rapid as during the first five years. He testified that Claimant, if exposed to 90 decibels, 10 minutes an hour for 12 hours, over 9 straight days, would probably not experience a hearing loss.

Employer's Exhibit 1 and Claimant's Exhibit 9 is Dr. Gonsoulin's report, dated October 5, 1999. His report stated that Claimant's work history suggested that a "majority of his employment was in the construction industry and not in the shipyard industry." (pg. 4) Dr. Gonsoulin opined that the etiology of Claimant's hearing loss was loud noise exposure. "I would state that his hearing loss is consistent with loud noise exposure as at least a part of his hearing loss. The asymmetry would not be normally explained by industrial loud noise exposure, but would tend to be more consistent with other etiologies such as gun fire." (Id.) However, Claimant did not present a long history of shot gun shooting exposure. "I am thus at a loss to totally explain the asymmetry in his audiometric findings." (Id.)

Findings of Fact and Law

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984). It must be further recognized that all factual doubts must be resolved in favor of Claimant. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Strachan Shipping Co. v. Shea*, 406 F.2d 521 (5th Cir. 1969). Furthermore, it has been consistently held that the Act must be construed liberally in favor of Claimant. *Voirs v. Eikel*, 346 US 328, 333 (1953); *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, 399 (5th Cir. 1987).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

Claimant, a boiler maker, was hired by Matthew Marine to repair the side of the GOLDEN CHASE. He worked at Nicholls Street Wharf for 9 consecutive days, November 13, 1997 through November 20, 1997, 12-hours per day. His duties were performed in the hold of the ship and included the use of a welding machine, cutting torch, electric grinder, arc gouger, chipping hammer, maul and dogs. The cargo hold was open air and between 50 and 75 feet long, and 35 feet wide. Three to four other welders also worked inside the hold as other welders worked outside of the hold and on the deck, using the same equipment as Claimant. Claimant testified that the noise level inside of the hold was "real high" about 80 % to 85 % of the time. Mr. Chalastaras also testified that the noise inside the hold was loud.

Mr. Durio conducted a simulation of Claimant's work environment whereby he measured the decibel level of the instruments Claimant used while performing his job. The decibel level associated with welding was between 78 and 79 decibels. Gouging averaged between 98 and 102 decibels, and grinding averaged between 93 and 94 decibels. There were also instances of 141 decibels being emitted from the impulse noise during wedging. According to Mr. Durio, OSHA standards require hearing protection when the exposure to decibel levels reach 85. Even though Mr. Durio averaged Claimant's total exposure to about 83 decibels, his opinion supports the fact that there were occasions when Claimant's decibel exposure was over 85 decibels, thereby establishing working conditions which could possibly cause hearing loss.

Noise surveys of Ingalls Shipyard and Alabama Dry Dock were also offered into evidence. These surveys of work environments similar to Claimant showed dosimeter readings ranging from 90 to 110 decibels, over the span of an 8-hour shift. Recommendations were made that once the decibel level reached 90, hearing protection should be worn by all employees to prevent loss of hearing.

Based upon the foregoing, I find that Claimant has established through his testimony, Mr. Chalastaras' testimony, Mr. Durio's simulation and 2 noise surveys of similar work environments, that working conditions existed which could have caused, aggravated or accelerated Claimant's hearing loss.

Claimant had an audiological evaluation on December 28, 1998 by Dr. Robert Brousse. He opined that Claimant did have a bilateral sensorineural hearing loss with an impairment rating of 14.4 %. "This hearing loss is consistent with Claimant's age. However, Claimant's history of extensive noise exposure that Claimant described today is most likely contributing to his current level of hearing. The contribution of each of these factors to Claimant's hearing loss is indeterminable." Likewise, Dr. Gonsoulin stated Claimant's hearing loss was consistent with loud noise exposure. Claimant has therefore established that he suffered a harm.

In sum, I find that Claimant has shown he suffered a harm and that employment conditions existed at Matthew Marine which could have caused, aggravated or accelerated the condition. Therefore, Claimant has invoked the Section 20(a) presumption.

To rebut this presumption, Employer offered substantial and countervailing evidence through the testimony of Mr. Durio and Dr. Gonsoulin. Mr. Durio calculated that Claimant, while working for Employer, was exposed to an average decibel level of 83. In his expert opinion, Claimant, when exposed to a decibel level in the low 80s, over a 9 day period, would not suffer any degree of hearing loss. He testified that even taking his highest readings from the simulation and doubling them, Claimant would still not have been exposed to injurious noise stimuli while employed by Matthew Marine. "Claimant's loss is not attributable in whole or part to his work at Matthew Marine, Inc. from 11/13-21/97. He had a preexisting hearing loss which the noise levels realistically encountered at the Matthew Marine, Inc. project would not have aggravated. His audiometric history indicates that not only would those levels not aggravate his preexisting loss, they clearly did not do so." (EX 5, pg. 2)

Dr. Thomas Gonsoulin is a board certified otolaryngologist. As an ear, nose and throat physician, 20% of his practice involves hearing loss patients. From the audiogram he performed on Claimant, he opined that Claimant had a "noise exposure sensorineural hearing loss in both ears, worse in the left than the right." Dr. Gonsoulin testified that an asymmetrical hearing loss is inconsistent with occupational noise exposure. Usually in a work environment people move around, thereby injuring both ears simultaneously. Dr. Gonsoulin calculated Claimant's binaural impairment at 12.8 %.

As Employer was able to rebut the Section 20(a) presumption, I must next weigh all of the evidence. In doing so, I find Claimant has established causation. The results of Mr. Durio's simulation and his conclusions are weakened because his simulation was not a replica of Claimant's work environment. The tests Mr. Durio performed were in an open shop, instead of inside the hold of a ship. Secondly, Mr. Durio only simulated the activities of one welder. Claimant, on the other hand, testified he worked with at least 3 other welders inside of the hold, with his partner standing only a hand's distance away from Claimant. Claimant was exposed to his partner's noise as well as to loud noise from the welders working on the outside of the hold. Mr. Durio's decibel readings did not take these factors into consideration. Mr. Durio did however acknowledge that another welder's activities would raise the decibel readings at most by 2 decibels. Under Mr. Durio's results, Claimant's decibel exposure would then increase from 83 to 85 decibels, qualifying Claimant under OSHA standards for a possible hearing loss.

An audiogram was performed by Beatriz Ramallo, four days after Claimant left Matthew Marine. Ms. Ramallo stated in her report that the audiogram was inconclusive, and I place no weight upon the test. However, Claimant was also evaluated by Dr. Brousse in 1998, more than one year after his employment with Matthew Marine terminated. His diagnosis was hearing loss consistent with Claimant's age, but stated Claimant's history of extensive noise exposure contributed to his current level of hearing.

Dr. Gonsoulin evaluated Claimant in 1999. He explained that loud noise exposure could cause tinnitus, or ringing in the ears. Claimant had such a symptom. On a typical audiogram, loud-noise exposure manifests itself at 4000 cycles per second in an upward curve on both sides of that loss. The audiogram he performed on Claimant had such a "notching." Dr. Gonsoulin too opined that Claimant's hearing loss was consistent with loud noise exposure. "I would state that his hearing loss is consistent with loud noise exposure as at least a part of his hearing loss. The asymmetry would not be normally explained by industrial loud noise exposure, but would tend to be more consistent with other etiologies such as gun fire." However, Claimant did not present a long history of shot gun shooting exposure. "I am thus at a loss to totally explain the asymmetry in his audiometric findings."

In sum, based upon levels of exposure Claimant has established he was exposed to while working with Employer, coupled with the opinions of Drs. Brousse and Gonsoulin that, at least in part, Claimant suffers a noise induced hearing loss, I find that Claimant has proven causation.

Nature and Extent

Claimant had two audiograms performed upon leaving his employment with Matthew Marine which are of no assistance. In 1998, Dr. Brousse calculated Claimant's binaural impairment at 14.4 %. In 1999, Dr. Gonsoulin calculated Claimant's binaural impairment at 12.8 %. The results are so close, I find that the appropriate determination of Claimant's hearing loss is calculated by averaging the results of the two audiograms. I find Claimant suffers a 13.6 % binaural impairment.

Section 8 (c) (13) of the Act specifies under the schedule that a maximum of

200 weeks is awarded for loss of hearing in both ears. Since Claimant's degree of binaural impairment is 13.6 %, he is entitled to 27.2 weeks of disability compensation based on an average weekly wage of \$800.03 and a compensation rate of \$533.36.²³

ORDER

It is hereby **ORDERED** that:

1. Employer shall pay to Claimant disability compensation in accordance with Section 8 (c)(13) of the Act for a 13.6 % binaural hearing impairment based on an average weekly wage of \$800.03 and a comp rate of \$533.36 per week for 27.2 weeks;

2. Employer shall pay all medical expenses that arise out of and are causally related to Claimant's injury in this case;

3. Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. § 1961 and *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

4. Counsel for Claimant, within 20 days of receipt of this ORDER, shall submit a fully supported fee application, a copy of which must be sent to opposing counsel who shall then have 10 days to respond with objections thereto. *See*, 20 C.F.R. § 702.132; and

5. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 30th day of November, 2000, at Metairie, Louisiana.

²³Both parties stipulated to average weekly wage and comp rate in Joint Exhibit 1.

C. RICHARD AVERY
Administrative Law Judge

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